Insurance/ Reinsurance

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INSURANCE BULLETIN





Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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1. Regulation and legislation

Europe: Deadline to comply with EIOPA's guidelines on third country branches closes

National competent authorities (NCAs) were expected to advise the European Insurance and Occupational Pensions Authority (EIOPA) by 30 May on whether or not they intend to comply with its guidelines on the supervision of branches of third-country insurance undertakings (the Guidelines) under Solvency II.

The guidelines were published on 30 March 2016 and relate to certain provisions of Solvency II concerning branches of insurance or reinsurance firms established within the European Union (EU) and whose head offices are located in non-EU countries. They do not apply to non–EU firms who solely carry out reinsurance business through its European branch even if it carries out direct insurance through its head office or branches outside of the EU.

The aim of the guidelines is to ensure that policyholders are offered consistent, efficient and effective protection within the EU when dealing with a branch of a non EU insurance firm.

EIOPA were tasked with issuing its Guidelines to NCAs with a view to establishing consistent, efficient and effective supervisory practices to achieve a stable and strong market for financial services in Europe.

The guidelines cover a number of areas ranging from authorisation and financial soundness of the branch to governance and risk management.

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NCAs which intend to comply will be required to incorporate the guidelines into their regulatory framework. In the Prudential Regulation Authority's (PRA) consultation paper[1], it confirmed its intention to comply and "take full account of them in its on-going supervision of the new Solvency II framework for third country branch undertakings".

For more information, please contact Davinia Collins, Associate, London, on +44 (0)20 7264 8276, or davinia.collins@hfw.com, or your usual contact at HFW.

1 http://www.bankofengland.co.uk/pra/Documents/publications/cp/2015/cp3115.pdf

Europe and US: European Commission joint statement on US-EU negotiations for a bilateral agreement on insurance and reinsurance measures

The European Commission has published a joint statement[1] on US-EU negotiations for a bilateral agreement on insurance and reinsurance measures.

This US-EU project, which began in January 2012, concerns the regulatory and supervisory treatment of insurers and reinsurers operating both in the US and the EU and is aimed at enhancing (i) understanding and cooperation for the benefit of insurance consumers, (ii) business opportunity and (iii) effective supervision.

The latest statement from the European Commission is very brief, containing no more detail than a similar statement which was released in February 2016.[2] It confirms that both sides have agreed to continue pursuing an agreement on matters relating to group supervision, exchange of confidential information between supervisory authorities, and reinsurance supervision.

The statement concludes by saying that both the US and EU representatives *"are considering next steps to ensure advancement of the negotiations."* It is perhaps best not to hold one's breath, but we will continue to monitor the progress of the negotiations.

For more information, please contact Will Reddie, Associate, London, on +44 (0)20 7264 8758, or william.reddie@hfw.com, or your usual contact at HFW.

1 http://ec.europa.eu/finance/insurance/docs/solvency/international/160527-us-eu-joint-statement_en.pdf

2 http://ec.europa.eu/finance/insurance/docs/solvency/international/160223-us-eu-joint-statement_en.pdf

2. Market developments

UK: Government accepts Insurance Fraud Taskforce's proposals in full

The government has accepted in full the recommendations which the Insurance Fraud Taskforce made in its final report of January 2016, on which we reported in our Bulletin of 28 January 2016[1]. The recommendations include stronger fining powers for the Solicitors Regulation Authority (the SRA), a lower burden of proof before the Solicitors Disciplinary Tribunal, and the need to introduce further measures to discourage 'late' personal injury claims.

However, the government's actions have not been met with universal approval. One pro-claimant observer was particularly damning, describing the Insurance Fraud Taskforce as "insurance-dominated" and its report and recommendations as "entirely unsubstantiated... pro-insurance propaganda".

Although these comments could be taken with a pinch of salt, it is interesting to note that the Law Society also published a statement[2] in which it expressed its belief that the government could be doing more to tackle fraudulent claims, and could have used this opportunity to adopt additional measures aimed at the industry. In particular, the Law Society called on steps to be taken to stop the inappropriate use of pre-medical offers, which prevent the value of claims being properly assessed against medical evidence. The Law Society urged insurers to defend claims which they believe to be fraudulent, or where they believe that the claimant might be exaggerating his or her injuries, on the basis that failing to do so will simply encourage more fraudulent claims and increase the cost of insurance.

Treasury minister Harriett Baldwin has confirmed that, in due course, the government will publish its proposals on how the Insurance Fraud TaskForce's recommendations will be implemented.

The Law Society also suggested introducing a clear definition of what constitutes a fraudulent claim. However, the Law Commissions made clear during the consultation process for the Insurance Act 2015 that they had specifically avoided defining "fraud" in that Act, and intended the common law definition to apply, so at present it seems unlikely that the Law Society will have any success in obtaining further clarification of "fraud" in this context.

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1 http://www.hfw.com/Insurance-Bulletin-28-January-2016

2 http://www.lawsociety.org.uk/news/press-releases/law-society-says-government-claimant-and-defendant-solicitors-must-work-together-to-stop-fraud/

3. Court cases and arbitration

Rodney Mark Gardner v Lemma Europe Insurance Company Limited (In Liquidation)[1]: What constitutes a "Claim" under a professional indemnity policy?

A solicitor appealed against an order dismissing his application to lift a stay on proceedings in the UK against his insolvent professional indemnity insurer[2]. The solicitor wished to start arbitration proceedings against the insolvent insurer as it would allow him to be compensated for his defence costs, not by the insurer, but by the UK Financial Services Compensation Scheme. In order to lift the stay, the solicitor needed to show he had an arguable case that the costs he had incurred were covered by his insurance.

Rodney Mark Gardener (the Solicitor) incurred costs in the defence of disciplinary hearings brought against him by the Solicitors Regulation Authority. He sought to claim for these under his insurance. However, his professional indemnity insurer, Lemma Europe Insurance Company Limited (the Insurer), had gone into liquidation and the UK High Court had stayed all UK proceedings against it. The solicitor therefore sought to lift that stay so he could bring a claim for his costs.

Lifting the stay meant demonstrating to the Court of Appeal that the solicitor had an arguable case against the Insurer. To succeed in establishing that the defence costs were arguably covered by the insurance, the solicitor was required to prove that there was a "claim" under the policy and that the proceedings arose from it. However,

1 [2016] EWCA Civ 484

2 [2014] EWHC 3674 (Ch)

the definition of "claim" required an intention to seek compensation or damages, and the letter which the solicitor relied upon from a client did not articulate this intention. It was instead a mere request for files. Although the solicitor could have argued that the letter from the client was a "circumstance" giving rise to a claim (instead of a "claim") which might be covered, he did not take the point. Even if the solicitor had succeeded in establishing that a claim had been made, the solicitor was still unable to demonstrate that it was a claim from which the disciplinary proceedings had arisen. The solicitor unsuccessfully argued that the aggregation wording in the policy meant that the costs incurred need not arise from the claim, but a similar one. This argument failed because the wording only applied to the limits of cover and not to any other part of the policy.

It was considered that even if the solicitor had succeeded in persuading the Appeal Court that his construction of the relevant policy terms was correct, the High Court Judge had been entitled to exercise his discretion when declining to lift the stay. In the absence of a challenge to the competence of the court (of which there was none by the solicitor), the need to preserve the estate for the benefit of the creditors outweighed the contractual right of the insured solicitor to have his case determined in England. The appeal was therefore dismissed.

The solicitor unsuccessfully argued that the aggregation wording in the policy meant that the costs incurred need not arise from the claim, but a similar one.

As was demonstrated in this case, whether a claim is covered will depend upon a close analysis of the wording of the applicable policy, including the definition of "claim". Insureds may consider it prudent to notify as a circumstance a communication that does not clearly demonstrate an intention to bring a claim for compensation or damages (such as a request for documents or information) because the facts of the case of which the policyholder is aware suggest that a claim could follow the request. While the request itself may not satisfy the definition of a "claim", it may still be appropriate and sensible to notify the request as a "circumstance" giving rise to a claim which has not yet been articulated by the potential claimant.

Links: http://www.bailii.org/ew/cases/EWCA/Civ/2016/484.html

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4. HFW publications and events

HFW to attend Association Internationale de Droit des Assurances (AIDA) Conference

HFW Partner Pierre-Olivier Leblanc will be attending the annual conference of the Association Internationale de Droit des Assurances (AIDA) in Helsinki on Wednesday 15 and Thursday 16 June.

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